



DAVID A. PATERSON  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**RANDALL M. HINTON,**

Complainant,

v.

**NEW YORK STATE INSURANCE FUND,**

Respondent.

**and NEW YORK STATE, OFFICE OF THE STATE  
COMPTROLLER, NEW YORK STATE,  
DEPARTMENT OF CIVIL SERVICE, Necessary  
Parties.**

**NOTICE AND  
FINAL ORDER**

Case No. 10131204

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on June 28, 2010, by Michael T. Groben, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

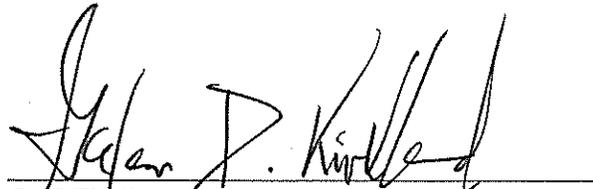
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED  
ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D.  
KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE  
DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of

Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **DEC 22 2010**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



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GOVERNOR

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STATE COMPTROLLER, NEW YORK  
STATE, DEPARTMENT OF CIVIL  
SERVICE**, Necessary Parties.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10131204**

**SUMMARY**

Complainant, a Native American, alleged that Respondent unlawfully discriminated against him in employment because of his race, color, and national origin, and that it retaliated against him because he had filed a lawsuit opposing discrimination. Respondent denied these allegations. Complainant has failed to meet his burden of proof, and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On February 2, 2009, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory

practices relating to employment because of his race/color and in retaliation for his having opposed discrimination, in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law"). An amended complaint, dated February 27, 2009, was filed on March 4, 2009. That amendment added allegations of unlawful discrimination due to Complainant's national origin and political affiliations.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices due to race/color and national origin, and that it had retaliated against Complainant. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 17, 2009, and January 14, 2010.

Complainant and Respondent appeared at the hearing. Complainant was represented by the Luibrand Law Firm, PLLC, by Kevin A. Luibrand, Esq. Respondent was represented by Gleason, Dunn, Walsh & O'Shea, by Ronald G. Dunn, Esq.

At the end of the January 14, 2010 hearing session, Respondent made an application for the record to be left open to give Respondent the opportunity to submit additional documents in evidence. By stipulation of the parties, Respondent submitted said additional documents to ALJ Groben in March 2010, and said documents were received in evidence as Respondent's Exhibits 12 through 28. (Tr. 552-61, 670-71)

Permission to file post-hearing briefs was granted, and both parties timely submitted proposed findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Complainant is a Native American and a member of the Passamaquoddy Indian Tribe. (Tr. 212) He is an employee of the New York State Insurance Fund ("NYSIF"). (Tr. 205)
2. Respondent NYSIF is an agency created by the New York State Worker's Compensation Law. NYSIF sells worker's compensation and disability insurance to private employers, and acts as an insurance carrier for state agencies. (Tr. 26)
3. Complainant has been employed by a number of New York State agencies. In 1986, he was hired by the Department of Civil Service. Complainant held various positions there; his duties generally involved auditing, internal controls and investigation, and classification of job titles. (Tr. 205-12, 269-85, 433-34) While employed by the Department of Civil Service, Complainant also acted as a liaison between the State of New York and various Native American tribes. (Tr. 212-14)
4. Beginning in 1997, Complainant was employed by the New York State Department of Environmental Conservation ("DEC"), supervising audits and investigations, and also serving as a liaison to Native Americans. (Tr. 172-73, 210, 214-16, 285-86)
5. New York State maintains a schedule of salary grades for its employees. At DEC, Complainant advanced to salary grade M-4/M-5, which was reduced to M-2 in 1999. (Tr. 216, 287-88)
6. In 2000, Complainant filed a lawsuit in federal court (the "DEC lawsuit") against the Commissioner and Assistant Commissioner of DEC and the State of New York alleging, inter alia, that defendants had discriminated against him because of his race and ethnicity in violation

of federal statutes and Human Rights Law § 296. Complainant was represented by counsel.  
(Complainant's Exhibit 1; Tr. 216-17, 289-92)

7. That lawsuit was settled by a so-ordered Stipulation and Order of Discontinuance (the "Stipulation") on January 2, 2002. The Stipulation specified that within 30 days of the execution of the Stipulation, Complainant's position would be moved from DEC to NYSIF, and that he would be employed at NYSIF in the same permanent civil service title he held at DEC: "Director, Investigations", Grade M-2, and at the same salary. The Stipulation also specified that Complainant would perform certain kinds of supervisory and investigatory work. (Complainant's Exhibits 2, 4; Tr. 89-90, 217-18, 292-302)

8. At that time, Christopher Barclay ("Barclay") was the deputy executive director and director of upstate operations for NYSIF. (Tr. 616-18) Prior to the signing of the Stipulation, representatives of the Governor's office and Attorney General's office discussed the possibility of Complainant's job being moved to NYSIF with Barclay and Ken Ross ("Ross"), then NYSIF's executive director. Barclay and Ross agreed to accept Complainant at NYSIF. (Tr. 578-79, 621-23, 627-28, 665-66)

9. Neither NYSIF nor its officials were involved in the DEC lawsuit. (Tr. 89, 294-95, 585-86, 620-21, 623, 632-34)

10. Judith A. Hogue ("Hogue") has been employed by a number of state agencies, including the New York State Department of Civil Service, where her responsibilities included setting qualifications for jobs. (Tr. 519-20) Between 1996 and 2002, Hogue was employed full time as the NYSIF director of human resources, in charge of classification, recruitment and employee training. From 2002 to 2004 she worked part-time at NYSIF on classification of employees. (Tr. 232, 520-21, 526)

11. Barclay directed Hogue to move Complainant's position to NYSIF, as per the Stipulation. (Complainant's Exhibit 2; Tr. 522, 530-32)

12. Hogue was unable to do so, because NYSIF, as an agency, was not under the same budgetary authority as DEC. For that reason, it was necessary to create a position for Complainant at NYSIF. Because a job title for Complainant's new position at NYSIF did not exist, and a title was necessary in order to put Complainant on the payroll, the job description for the position of Director of Investigations for the New York State Department of Civil Service was appended to Complainant's transfer documents. That job description, unique to the Department of Civil Service, was used for transfer purposes only, and was not intended to be Complainant's new job description at NYSIF. (Complainant's Exhibits 2, 25; Tr. 235-36, 427-29, 439-42, 499, 532-45, 567-72)

13. Complainant's pay, hours of work, and leave credits were not affected by his transfer to NYSIF. (Tr. 319-22, 429)

#### **NYSIF Management**

14. Edward Obertubbesing ("Obertubbesing") is presently an associate attorney with NYSIF. (Tr. 23) Between November 2000 and May 2007 Obertubbesing was the business manager of NYSIF's Albany District office, an office with approximately 200 employees. He was responsible for most of the day-to-day operations of that office. (Complainant's Exhibit 9; Tr. 25, 27, 86-87, 136) Obertubbesing was Complainant's direct supervisor from January 2002 until the end of May, 2007. (Complainant's Exhibits 3, 24; Tr. 25-27, 78-79)

15. As business manager, Obertubbesing reported to executive level staff of NYSIF. The person he reported to for most of his career as business manager was Barclay, as deputy

executive director. Executive level staff were located in Albany, but housed in a different building than NYSIF's Albany District office staff. (Tr. 28-29, 32)

16. Barclay began working for NYSIF in 1995. (Tr. 612) He was appointed the deputy executive director and director of upstate operations for NYSIF in 2001, and worked in that capacity until the end of 2006, when he became NYSIF's first deputy executive director. (Tr. 616-18) In 2003, Barclay was given the additional title of secretary to NYSIF's board of commissioners. (Tr. 576-77)

17. As first deputy executive director, Barclay was responsible for overall administration of NYSIF's business offices, including personnel and budget. Barclay left the position of first deputy director in September 2007 to act full-time as NYSIF board secretary. (Tr. 618-19)

18. Barclay's superior at NYSIF was the executive director. From 2002 to the spring of 2005, Ross occupied that position. (Tr. 578)

19. After Ross left, Barclay and Doug Haidman functioned as co-directors for approximately six months. From January of 2006 through March 2009, David Wehner ("Wehner") was the executive director of NYSIF. (Tr. 20-29) His responsibilities included overall supervision of the business and administrative functions of NYSIF. (Tr. 249, 471-72, 473) Wehner reported directly to NYSIF's nine member Board of Commissioners. (Tr. 485-86)

20. Albert DiMeglio ("DiMeglio") was director of administration at NYSIF in January 2002. The NYSIF director of administration has general responsibilities for day to day operations of NYSIF, and works closely with the NYSIF executive director. Various departments of NYSIF, including personnel and human resources report to the director of administration. (Tr. 30-31, 628-29) DiMeglio was the NYSIF director of administration until September 2006. (Tr. 507-08)

21. Thomas Gleason ("Gleason") has been NYSIF's deputy executive director since January 2008. (Tr. 255, 483-84)

22. Joe Nolte ("Nolte") served as the manager of NYSIF's Albany District Office claims department from approximately 1997 until June 2007, when he was appointed the business manager of NYSIF's Albany District Office. Nolte is a grade M-3 employee. (Tr. 79, 105, 140-41, 237)

**Complainant's Employment 2002-2006**

23. NYSIF employs a number of employees with the title of Customer Service Representative ("CSR"). (Complainant's Exhibits 3, 9; Tr. 77, 121, 450-55)

24. NYSIF's First Report of Injury unit ("FROI") was responsible for conducting telephone interviews with policyholders and claimants regarding new cases. FROI provides information to NYSIF's claims department. (Tr. 36-37, 142) In January 2002, FROI had a staff of three CSRs: William Farnan ("Farnan"), and two others. (Complainant's Exhibits 3, 8; Tr. 37, 64, 102-03, 145, 147-148, 588)

25. Barclay, Obertubbesing, Nolte, and DiMeglio agreed that pursuant to the Stipulation, it would be appropriate for Complainant to supervise the FROI unit. (Tr. 36-37, 90-98, 102, 173-76, 199-201) Obertubbesing proposed responsibilities for Complainant, which were reviewed by Barclay, Ross, and representatives of the Governor's office and found to be in compliance with the Stipulation. (Tr. 580-82, 586-87)

26. NYSIF management did not inquire as to Complainant's background and work history before assigning him to FROI. (Complainant's Exhibit 6; Tr. 624-27, 630-31)

27. Complainant began work at NYSIF in January of 2002, and on January 31, 2002, Obertubbesing, Nolte and NYSIF general counsel Nancy Wood met with Complainant to discuss his job responsibilities. (Complainant's Exhibit 8; Tr. 30, 48, 218-20)

28. Complainant promptly advised Obertubbesing that he was not satisfied with this assignment, and asked to meet with Barclay. Barclay did not do so, because Nolte was Complainant's immediate supervisor, and Barclay believed that Complainant should follow the chain of command. (Complainant's Exhibit 5; Tr. 35, 42-45, 225-26, 589-91, 635)

29. In February, 2002 Complainant's duties were set forth for him in a memo from Obertubbesing. Complainant was to receive his assignments through Nolte and Wood. In a meeting that month and subsequently, Complainant continued his protests and advised Obertubbesing that his job duties were not in compliance with those set forth in the Stipulation. Complainant requested a policymaking position. In response, Obertebussing advised him that the job duties were not in violation of the Stipulation. (Complainant's Exhibit 8; Tr. 35, 42-45, 58-59, 144-45, 220-24, 226-28, 309-11, 316-18, 341-44)

30. Complainant believed that Respondent had assigned him the task of overseeing the FROI unit in 2002 as a means of retaliating against him because of the DEC lawsuit. (Tr. 302-09, 315) Complainant produced no evidence for this except his own belief.

31. A grievance procedure was available to Complainant. Complainant did not file a grievance regarding his assignment. (Respondent's Exhibit 10; Tr. 100-02, 412) Complainant believed that his duties as assigned were inconsistent with the Stipulation. However, although he discussed the matter with his attorney, he never sued to enforce the Stipulation. (Tr. 311-16, 345)

*Derogatory Remarks about Complainant's Race/Color*

32. In 2005, Complainant complained to Respondent that a fellow employee had made disparaging remarks about him as a Native American. That employee was then disciplined by Respondent. Complainant was unaware of any other NYSIF employee or manager who had made racist or disparaging remarks regarding his status as a Native American. (Tr. 131-34, 346-60, 363-64)

**Complainant's Employment 2006-2009**

33. In or about September 2006, personnel from the Department of Civil Service expressed concerns to NYSIF management that the command structure for CSRs within NYSIF did not comply with the Civil Service Law. NYSIF was about to hire a number of new CSRs, and NYSIF management began considering a reorganization of the CSRs within NYSIF in order to meet Civil Service requirements. (Tr. 64-65, 104-07, 229, 592-93, 594-95)

*Availability of CSR Jobs*

34. At the public hearing, Complainant testified that certain high-level CSR jobs of interest to him were filled at this time by NYSIF, and their availability was not made known to him in retaliation for the DEC lawsuit. Complainant presented no evidence for this, other than his own belief. (ALJ's Exhibits 1, 2; Tr. 328-36)

*Decentralizing CSR Functions*

35. Obertebussing asked Nolte and Complainant for their comments on a proposal to decentralize the distribution of lower-level CSRs at NYSIF. This would require, inter alia, the distribution of CSRs presently assigned to the FROI unit to other locations at NYSIF with a consequent reduction in Complainant's supervisory responsibilities. Complainant opposed the

proposal. Nolte, after discussing same with his staff, was in favor of decentralizing the CSRs. (Complainant's Exhibits 15, 16, 17, Respondent's Exhibit 9; 65-68, 109, 176-79, 180-81, 325-27, 336-38)

36. Obertebussing had noticed that Complainant had problems with the people he supervised in FROI, and felt that a reduction in Complainant's supervisory responsibilities might be helpful. (Complainant's Exhibit 18; Tr. 103-04, 114-16, 185-86, 197-98)

37. Obertebussing and Nolte decided that decentralizing the CSRs was the proper course to take. This decision was confirmed with Barclay. (Complainant's Exhibits 18, 19; Tr. 112-14, 181-83, 595, 597-99) In October 2006, the decentralization plan was implemented. Two of the CSRs assigned to Complainant's FROI unit were moved, leaving Complainant with one person, Farnan, to supervise. (Complainant's Exhibit 3; Tr. 68-69, 111, 322-25, 595-96, 603)

38. Complainant was also made responsible for NYSIF's "eFROI" program, in which NYSIF's policyholders could send reports through the Internet, to be processed by FROI. NYSIF was attempting to minimize the use of paper reports, and encouraged Internet reporting through its paperless initiative. As a result, the eFROI program was expected to expand and provide adequate work for FROI. (Tr. 118, 184-85, 600-01)

39. The decentralization of the CSRs was not implemented in order to discriminate against Complainant due to his Native American heritage, or to retaliate against him for the DEC lawsuit. (Tr. 107-10, 111-12, 116-18, 183-84, 328-29, 336-38, 338-41, 608)

40. Complainant believed that the change in his duties resulting from the reorganization of FROI was in violation of the Stipulation. Complainant did not file a grievance or sue to enforce the Stipulation. (Tr. 324, 341-345)

*Complainant's Job Responsibilities*

41. On May 16, 2007, a few days before Obertebussing left NYSIF, he wrote a memo to Barclay advising him that Complainant did not have enough work to do, and then discussed the matter with Barclay. Obertebussing also suggested another job he thought Complainant might be interested in; he did not know whether that position was currently available. (Complainant's Exhibits 23, 24; Tr. 124-130, 149-51, 603-05)

42. As the new business manager of NYSIF's Albany office, Nolte believed that Complainant had enough work to do, and so did not advise Barclay that further or different assignments were needed. Nolte saw no evidence that Complainant was being discriminated against at NYSIF. (Tr. 187-88, 196-97, 605-06, 667-69)

43. Complainant conceded that Nolte had not unlawfully discriminated against him. (Tr. 401-12, 417-19)

44. When Nolte took over as business manager of the Albany office in June 2007, Obertebussing advised him that he had not done an evaluation of Complainant's performance in the previous year. (Tr. 70-74, 154-55) Complainant advised Nolte that he would refuse to fill out the self-assessment portion of an evaluation other than to state that he was doing nothing. (Tr. 156, 242-43, 245) Barclay and Nolte discussed the situation, and it was decided that requiring Complainant to fill out a self-assessment evaluation form would not be productive. (Tr. 158-165, 186-89, 201-03)

*Complainant Seeks Advancement*

45. Complainant believed that his difficulties in securing opportunities and advancement at NYSIF were due to political opposition from Republican officials of the administration of

Governor Pataki, and later due to Republican “holdovers” at NYSIF during the Democratic administrations of Governors Spitzer and Paterson. (Complainant's Exhibits 26, 30, 32; Respondent's Exhibit 7; Tr. 339, 379-380) I take judicial notice of the fact that Governor Eliot Spitzer was in office from January 2007 through mid-March 2008, and that Governor David A. Paterson succeeded him.

46. In June 2007, Complainant made application through Governor Spitzer’s appointments secretary, Francine James, for a position at DEC, and advised her that he was not interested in further employment opportunities at NYSIF. This request and subsequent requests, including one as late as January 2009, were not granted. Complainant believed that this was because he had been “stigmatized” because of the DEC lawsuit. Complainant presented no evidence for this, other than his own belief. (Complainant's Exhibits 26, 27, 28, 32; Tr. 238-41, 381, 389-400, 406-10, 455-58)

47. In his verified complaint, Complainant alleged that a Caucasian individual named Lawrence LaPointe (“LaPointe”) had been hired as NYSIF’s director of investigations at a higher salary than Complainant, although when hired he had less experience than Complainant. (ALJ's Exhibit's 1, 2; Complainant's Exhibit 32) In testimony at the public hearing, Complainant conceded that Lapointe had been employed by NYSIF in that position prior to Complainant's arrival, and that he was not alleging that Lapointe should have been removed by NYSIF to make room for him. (Respondent’s Exhibits 3, 19, 20, 21; Tr. 52-53, 130-31, 368-70, 373, 376-77, 608-09)

48. In his verified complaint, Complainant alleged that in 2008 a Caucasian individual named Joseph Miller was hired as NYSIF’s director of internal controls, and that although Complainant was qualified for this position, he was never considered for it. (ALJ's Exhibit's 1, 2)

Miller was appointed to this position on or about September 25, 2008. (Respondent's Exhibits 4, 5, 13, 14, 15, 16) At the public hearing, Complainant conceded that he had never applied for this job, because he was not aware of its availability. (Tr. 377-382)

49. Another NYSIF position which Complainant felt he was qualified for, director of internal audit, was filled during the Spitzer administration through the governor's appointments office. Complainant conceded that he had not been aware of the job's availability, and had never applied for it. Complainant believed that he had been denied the opportunity by the governor's appointments office to apply for positions in retaliation for the DEC lawsuit. Complainant produced no facts to support this, other than his own opinion. (Respondents Exhibits 17, 18; Tr. 382-88)

50. Other positions which Complainant believed that he had been denied because of his Native American heritage or in retaliation for the DEC lawsuit, were either occupied prior to his arrival at NYSIF, or were of a lower pay grade than Complainant's M-2. Complainant would not accept a lower paying position. (Respondent's Exhibit 23; Tr. 324, 329, 373-75)

51. In November 2008, Nolte advised NYSIF employees by e-mail of Governor Paterson's proclamation of November as Native American month. (Complainant's Exhibit 29) Complainant responded angrily, with an e-mail accusing Barclay and executive director Wehner of hindering his advancement because of the DEC lawsuit. (Complainant's Exhibit 30; Tr. 194) By that time, Barclay was no longer first deputy director and was no longer responsible for overall administration of NYSIF's business offices. Barclay had become secretary to NYSIF's board of commissioners, where he was responsible for overseeing the administrative functions of the board. (Tr. 619-20)

52. Wehner was unaware of Hinton's situation, and met with him in early December 2008. (Tr. 248-53, 423-26, 475-76, 477-81, 493-94, 499, 501-04, 510-13, 515-16) At that meeting, Wehner and Complainant discussed the possibility of Complainant's working in NYSIF's division of confidential investigations, which Complainant declined. (Tr. 479-80) They also discussed two jobs at NYSIF, director of internal audit and director of internal control. These positions had already been filled, however, and Wehner advised Complainant that control of patronage was with the governor's appointments office, and not with him. (Tr. 252-53)

53. Wehner advised Complainant that he would pursue the matter and would contact him. (Tr. 425) Wehner then asked Nolte and director of administration Joe Mullen to come up with some new assignments for Complainant, and they proposed assigning him to oversee quality control on NYSIF's Request for Proposals ("RFP") process, by means of which NYSIF would hire investigators in the private sector to perform work for NYSIF. (Tr. 168-69, 482-83, 506-07)

54. Nolte then met with Complainant and asked if he would consider the quality control position. Complainant, in the erroneous belief that Nolte was not acting with Wehner's authorization, rejected that opportunity. Nolte reported the rejection back to Wehner. (Tr. 169-73, 190-94, 203, 253-55, 419-23, 483)

55. In January 2009, Complainant sent an e-mail to Gleason, NYSIF's executive deputy director, attaching a copy of his e-mail to Nolte regarding Native American month, and asking him for a meeting. Gleason did not reply, and Complainant then filed his Division complaint. (Complainant's Exhibit 31; Tr. 255-56, 426-27, 483-84)

## OPINION AND DECISION

### Statute of Limitations

The Human Rights Law provides that, “[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.” Human Rights Law § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Comty. College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

Complainant filed his complaint on February 2, 2009. Acts that occurred between February 3, 2008 and February 2, 2009 fall within the statutory time period. Complainant claimed that in 2002, Respondent gave him job duties and responsibilities which were not commensurate with his experience and abilities, further reduced those job duties and responsibilities in October 2006, and subsequently failed to either hire him for a new position, or grant him any additional responsibilities more in line with his qualifications, all in retaliation for the DEC lawsuit.

As the record demonstrated, Complainant's claims regarding his 2002 employment and the 2006 change in his job responsibilities occurred well beyond the one-year statutory time period. Complainant's claims are only viable to the extent that he can show a continuing violation. 9 N.Y.C.R.R. § 465.3(e).

A continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice. *Clark v. State of New York*, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4<sup>th</sup> Dept. 2003)

*The 2002 FROI Assignment and the 2006 Reorganization*

In 2002, Respondent hired Complainant pursuant to the negotiated settlement embodied in the Stipulation. Complainant expressed immediate dissatisfaction with his duties, which he believed to be in violation of the Stipulation. However, he did not file a grievance or sue to enforce the Stipulation. Complainant introduced no evidence to demonstrate that he could not have availed himself of these remedies, or those available to him under state law, nor did he demonstrate that the assignment was made for discriminatory reasons. Complainant's hiring at NYSIF was a discrete act, and one which preceded the commencement of the instant proceeding by nine years. Complainant's claims for race/color discrimination, national origin discrimination, and retaliation stemming from his 2002 hiring at NYSIF and his job assignments are barred by the statute of limitations.

Complainant's claims relating to the 2006 NYSIF reorganization are likewise barred, and for the same reasons set forth above. In addition, Complainant himself conceded that those persons responsible for planning and implementing the reorganization did not do so in order to discriminate against Complainant because of his race/color or national origin, or to retaliate against him because of the DEC lawsuit. Complainant's allegations that other persons within NYSIF caused the reorganization to occur for discriminatory reasons are speculative and not supported by reliable evidence.

*Hostile Work Environment*

Complainant alleged that a NYSIF employee made disparaging remarks regarding his Native American heritage in 2005. Respondent took immediate and effective action to discipline the employee, and these remarks were not repeated. In any case, this was a discrete act, and Complainant's claim of a hostile work environment is barred by the one-year statute of

limitations. See, *Nat'l. Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002).

**Race/Color and National Origin Discrimination**

To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant is a member of a protected class by reason of his Native American heritage. Complainant was qualified for his position, and the record is clear that he did not receive various promotions or the grant of additional duties over a period of some years. However, the record is devoid of evidence that Respondent or its officials bore any animus towards Complainant because of his race/color or national origin. The one occasion in which Complainant was made a target because of his race/color and national origin by a fellow employee, was adequately dealt with by Respondent. This claim is dismissed.

**Political Affiliation**

The record is replete with Complainant's concerns that he was targeted by Republican officials and not allowed to advance in his career or to obtain additional responsibilities, because of his political affiliation. To the extent that Complainant's claims rely on this theory, said claims are not actionable. The Human Rights Law does not recognize political affiliation as a protected class. Human Rights Law § 296, et seq.

### Retaliation

In order to establish a prima facie case of retaliation, a complainant must show that: (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected activity; (3) he suffered an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v. Guiding Eyes for the Blind*, 742 F. Supp. 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v. New York State Div. of Human Rights*, 229 A.D.2d 631, 636, 644 N.Y.S.2d 864 (3d Dept. 1986).

Complainant's DEC lawsuit was an activity protected by the Human Rights Law, and certain of Respondent's officials were aware of this protected activity. Complainant did not experience any adverse changes in seniority, work hours, or pay. However, Complainant failed to obtain new responsibilities or positions on a number of occasions during the approximately two and one half years between the reorganization of the FROI unit and the filing of the verified complaint.

Complainant failed to establish a causal connection between the protected activity and his inability to obtain new work and/or responsibilities. Nolte, who was Complainant's supervisor from mid-2007 on, believed that Complainant did have enough work, and it was acknowledged by Complainant that Nolte did not retaliate against him. Although Complainant believed that he had been denied or refused the opportunity to apply for a number of positions in and outside of NYSIF, he did not establish by sufficient proof any connection between his protected activity and his failure to obtain these positions. Moreover, Complainant failed to present any evidence as to how Barclay, who Complainant apparently regarded as his nemesis at NYSIF, influenced

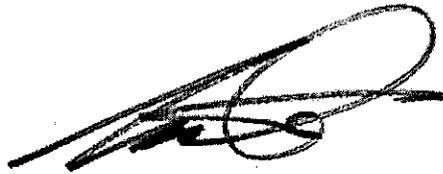
NYSIF's new management staff or the governor's appointments office, to deny Complainant sought-after positions or responsibilities after Barclay lost his position as NYSIF's first deputy executive director in 2007. To the extent that Complainant alleged that personnel of the governor's appointments office attempted to retaliate against him because of the DEC lawsuit, it is noted that none of those persons are named as Respondents herein. Therefore, this claim is dismissed.

**ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be and hereby is, dismissed.

DATED: June 28, 2010  
Bronx, New York

A handwritten signature in black ink, appearing to read 'Michael T. Groben', with a large, stylized flourish extending from the end of the signature.

Michael T. Groben  
Administrative Law Judge